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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-711

SOUTHEASTERN COMMUNITY COLLEGE, *Petitioner,*

v.

FRANCES B. DAVIS, *Respondent.*

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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FRANCES B. DAVIS,

Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Frances B. Davis, Respondent, respectfully prays that this court deny the Petitioner's Writ of Certiorari to review the judgment and opinion of the U.S. Court of Appeals for the Fourth Circuit entered in this proceeding on March 28, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 574 F.2d 1158, and is reprinted in Petitioner's Appendix A, p. 2a.

The opinion of the United States District Court for the Eastern District of North Carolina, in the form of findings of fact and conclusions of law, is reported at 424 F.Supp. 1341, and is reprinted in Petitioner's Appendix B, p. 12a.

JURISDICTION

Frances B. Davis, the respondent, brought this civil action under the Rehabilitation Act of 1973, 29 U.S.C. §794, and under the Civil Rights Act of 1871, 42 U.S.C. §1983, complaining that the petitioner college had unlawfully denied her admittance to its nursing program because of her admitted hearing disability. On December 22, 1976,

the District Court entered a final judgment dismissing tha action for lack of constitutional and statutory merit. See Appendix B, p. 12a,

On the respondent's appeal, the Fourth Circuit on March 28, 1978, affirmed the District Court's judgment in part, vacated the judgment in part, and remanded the case to the District Court for further proceedings. See Appendix A, p. 2a. On June 29, 1978, the Fourth Circuit denied both a petition for rehearing and suggestion for rehearing en banc, although there were dissents from both denials. See Appendix A, p. 1a.

On September 18, 1978, Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including October 27, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that no "otherwise qualified handicapped individual...shall, solely by reason of his handicap, be excluded from participation in...any program or activity receiving Federal financial assistance." The questions here presented are:

1. Whether Section 504 of this Act precluded a public college from basing a denial of admission to the college's Associate Degree Nursing Program solely upon an admittedly severe hearing handicap of the applicant, where it was shown that the handicap could interfere with the applicant's ability to provide safe patient care both as a student nurse and as a potential Registered Nurse.

2. Whether Section 504 of this Act impliedly imposes upon colleges and univer-

sities an affirmative obligation to provide opportunities for the seriously handicapped who seek admission to highly skilled professional programs.

3. Whether Section 504 of this Act impliedly gives rise to a private right of action in a federal court by a handicapped individual who has been denied admission to a college's nursing program because of the physical handicap.

4. Whether, if such a private action is implied, the handicapped applicant must first pursue and exhaust available H.E.W. administrative remedies respecting individual complaints of discrimination.

STATUTES AND RULES INVOLVED

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794:

No otherwise qualified handicapped individual in the United States, as defined in

section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

H.E.W. Regulations implementing Section 504 of the 1973 Act, May 4, 1977, 45 C.F.R. Part 84:

§84.3 Definitions.

As used in this part, the term:

* * * * * * * * * * * * * * * * * * *

(k) "Qualified handicapped person" means

* * * * * * * * * * * * * * * * * *

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity.

H.E.W. Analysis of Regulations, 45 C.F.R. Part 84, Appendix A, p. 376:

Definitions - 5. "Qualified handicapped person." Paragraph (k) of §84.3 defines the term "qualified handicapped person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all of the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects

the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

STATEMENT OF THE CASE

Frances Davis is an actively employed, duly qualified, licensed practical nurse. Her license, issued by the State of North Carolina in 1967, is currently in good standing. (Pl. Ex. 2)

Seeking to advance in the nursing profession, Ms. Davis in 1973 applied to Southeastern Community College for admission as a student in the 1973-74 school term, preparatory to entering the college's Associate Degree Nursing Program in September 1974. (Pl. Ex. 4) Ms. Davis submitted, as part of her application, her Pre-entrance Medical Record, which evaluated her as "...mentally and physically able to undertake the program in nursing." (Pl. Ex. 5) She then success-

fully completed her scheduled classes during the 1973-74 term.

As part of the college's evaluation process, Ms. Davis was interviewed in April of 1973 and again in March 1974. The college then requested that Ms. Davis submit an evaluation of her hearing by an audiologist.

The hearing evaluation indicated that Ms. Davis has a bilateral moderately severe sensori-neural hearing loss. The audiologist determined that the hearing aid worn by Ms. Davis "provided little if any help... and should be replaced." The audiologist concluded that: "Although Mrs. Davis performs adequately with the new hearing aid, she was encouraged to use her vision to support her hearing. She relies on her vision in helping her understand the speech of those with whom she is associated. The hearing aid imporves her hearing level to the"outer

limits of normal hearing levels." (Pl. Ex. 6)

The audiologist further reported that Ms. Davis had been fitted with a new hearing aid, "which provides her significant improvement in her hearing." (Pl. Ex. 8) Nevertheless, the college scheduled no further interviews with Ms. Davis. Instead, the college advised Ms. Davis that she did not qualify for acceptance in the college nursing program. (Pl. Ex. 9)

Ms. Davis then asked the college to review her application. The college requested an opinion from the Executive Director of the North Carolina Board of Nursing, who responded: "We concur with your opinion as stated on the telephone, that Ms. Davis' hearing disability can preclude her being safe for practice in any setting allowed by a license as a RN, or by license

as a LPN."[1] (Emphasis Added) (Pl. Ex. 11) But, the Executive Director further stated: "We cannot, at this time, predict eligibility or ineligibility for the licensing examination should Mrs. Davis enroll in, and be allowed to complete the program some several years hence." (Pl. Ex. 14)

The college also asked the Director of Nursing Services at Southeastern General Hospital whether the hospital would employ her as a registered nurse. (Pl. Ex. 16) The Director of Nursing Services responded, "In areas such as long term care, a doctor's office or even industrial, she could do well. I do not believe that I can truthfully state that she would not be able to function in any area

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[1]The Director obviously did not have the full facts on Ms. Davis' employment background. Petitioner misleads this Court in omitting this key underlined phrase.

of nursing with her present determination to continue her education." The Director further stated:

> I would employ Mrs. Davis in our Skilled Nursing Facility as an R.N. if I had a vacancy... we have the New Methodist Home that will be built in the near future that will have positions that I feel she can handle. Mrs. Davis could also handle the night assignment on our Post Partum Units without difficulty after she is registered.

(Pl. Ex. 15 & 17)

Citing the reports of the audioligist, the Executive Director to the State Board of Nursing, and the Director of Nursing Services at Southeastern General Hospital, the college then again rejected her application. Thereafter, she brought this suit.

Testimony at trial revealed that Ms. Davis was academically qualified for admission into the nursing program and that her application was rejected solely because of

her hearing disability. (Joint App. 47, 114) Yet, the testimony also indicated that there are no physical distinctions in qualifications for a Registered Nurse and a Licensed Practical Nurse under North Carolina Statute (Joint App. p. 70) The testimony further revealed that Ms. Davis, with an instructor supervising her, could have accomplished all skill levels in the clinical program, but that the college did not want to modify its program to compensate for Ms. Davis' hearing difficulty. (Joint App. p. 78) The college also admitted that it was not prepared to provide Ms. Davis with the supervision that might be necessary to compensate for her hearing disability in the clinical program. (Joint App. p. 79) Despite these admissions, the college still maintained that Ms. Davis "was not qualified or suitable for the Associate Degree Nursing Program by reason of her

disability." (Petition p. 17a)

The District Court held that Ms. Davis was not "otherwise qualified," and concluded that the college had not violated either Section 504 or 42 U.S.C.§1983 in refusing to admit Ms. Davis to the college's nursing program. (Petition, p. 20a)

On Appeal, the Fourth Circuit held unanimously that the District Court had erred in its reading of Section 504, particularily in light of the H.E.W. Regulation to Section 504, issued after the District Court decision. The Fourth Circuit ordered the District Court to reconsider Ms. Davis' application for admission to the college nursing program without regard to her hearing disability.

The court noted that "the college may consider such other relevant subjective and objective factors... utilized in the consideration of other candidates for enrollment in

the nursing program." (Petition p. 5a) While college nursing personnel had admitted that Ms. Davis was academically qualified, the panel expressed no further opinion concerning Ms. Davis' scholastic suitability. (Petition p. 5a)

The panel, thus, concluded that the District Court erred by considering the nature of Ms. Davis' hearing disability in determining whether she was otherwise qualified for admittance to the nursing program, instead of focusing upon her academic and technical qualifications as required by the H.E.W. Regulation. (Petition p. 6a) In light of the position of the college that it was not prepared to modify its nursing program to accommodate Ms. Davis' hearing disability, the panel directed the District Court, on remand, to give close attention to the H.E.W. Regulation requiring the college to modify

its program so as to accommodate Ms. Davis' disability. (Petition p. 9a)

The Fourth Circuit also affirmed the implicit ruling of the District Court that a private right of action exists under Section 504. (Petition p. 3a) However, in a footnote, the panel suggested that the District Court also consider the issue of administrative exhaustion and primary jurisdiction, matters which had not been raised in either the District Court or in argument before the panel. (Petition p. 11a)

The college petition for rehearing was soundly rejected, with only two judges voting to affirm the judgment of the District Court.

REASONS FOR DENYING THE WRIT

I. THE HOLDING IN THIS CASE IS TOO NARROW TO WARRANT REVIEW.

In asking the Supreme Court to grant a writ of certiorari in this case, petitioner seriously overstates both the breadth and potential impact of the Court of Appeals decision. Contrary to Petitioner's assertion, the holding in this case is too narrow to warrant review by this Court. From the outset of its opinion, the Fourth Circuit consistently stressed that, "Our holding on the merits of plaintiff's Section 504 claim is rather narrow." (Petition p. 5a)

Indeed, the only mandated result of the Fourth Circuit's decision is the remanding to the District Court for reconsideration of Ms. Davis' application for admission, in light of regulations implementing Section 504 that postdate the District Court decision. This remand is totally consistent

with the action of other circuits. See United Handicapped Federation v. Andre, 448 F. 2d 413 (8th Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1287-8 (7th Cir. 1977). This Court has followed a similar procedure of remanding to reconsider new regulations adopted after a decision in the lower courts. See Youakim v. Miller, 425 U.S. 231 (1975); Richardson v. Wright, 405 U.S. 208 (1972); Thorpe v. Housing Authority, 386 U.S. 670 (1967).

Yet Petitioner ignores the Fourth Circuit's express limitation of its decision "to the facts of this particular case." (Petition, p. 8a n.7a) Instead, Petitioner contends that the Fourth Circuit decision involves a significant initial interpretation of Section 504. To the contrary, the Court of Appeals made clear the limited scope of

their opinion when they stated, "We do not, at this time, absent a more fully developed record below, wish to expand further upon the regulations, their reasonableness, or their scope." (Petition 8a,n.7a)

II. THE FOURTH CIRCUIT WAS CORRECT IN VACATING AND REMANDING, IN LIGHT, OF INTERVENING REGULATIONS THE DISTRICT COURT'S DECISION ON THE MEANING OF "OTHERWISE QUALIFIED."

The Fourth Circuit found that the District Court's definition of "otherwise qualified" was contrary to the definition in subsequent HEW Regulations. In erroneously defining "otherwise qualified," the District Court held that the college could consider the nature of Ms. Davis' handicap in determining if she was "otherwise qualified" for admittance to the nursing program. The intervening HEW regulations, however, focus upon her academic and technical qualifications

in determining if she is qualified for admittance. The Fourth Circuit thus merely applied the law in effect at the time of its decision, Thorpe v. Housing Authority, 393 U.S. 268 (1969), giving great weight to the interpretation of Section 504 by the agency charged with its administration. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969); Udall v. Tallman, 380 U.S. 1 (1965).

In continually raising the spectre of the "blind bus driver," Petitioner seriously distorts the facts of this case.[2] While the Fourth Circuit left to

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[2]Petitioner further misleads this Court by indicating that the blind bus driver example is part of the definition which relates to post-secondary education of "qualified handicapped persons" (84.3(k)(3)). Rather, this example is included in the HEW analysis of the more general definition of "qualified handicapped person" that should logically be limited to employment.

the District Court the determination of affirmative relief, it should be noted that Ms. Davis' handicap is not as severe as Petitioner suggests. The college admits that she is academically qualified to participate in the Nursing Program. (Joint App. 14) The audiologist concluded that Ms. Davis can read lips well and that a new hearing aid "improves her hearing level to the outer limits of normal hearing levels." (Petition, p. 6a,n.6). For the last eleven years, Ms. Davis has been a duly qualified licensed practical nurse. Moreover, both the Fourth Circuit and the Director of Nursing Services at Southeastern General Hospital concluded that there are a number of settings in which Ms. Davis could perform satisfactorily as a registered nurse, such as industry or a physician's office. (Petition, p. 6a,n.6)

III. THE CIRCUIT COURT WAS CORRECT IN SUGGESTING THAT THE DISTRICT COURT GIVE CLOSE ATTENTION TO AFFIRMATIVE RELIEF PROVIDED IN INTERVENING HEW REGULATIONS.

Many of the issues that Petitioner raises, including affirmative relief and its financial repercussions, were never raised before the District Court or the Fourth Circuit panel. It was, therefore, entirely proper and fair for the Appeals Court to remand to the District Court for the taking of evidence and consideration of these issues. The Court of Appeals merely identified the issue of affirmative relief and instructed the District Court to give "close attention, on remand," to it. (Petition p. 9a) The Court of Appeals stated, "Of course, as we note in this opinion, repeatedly, the application and interpretation of the H.E.W. Regulations lie, in the first instance,

with the district court." (Petition, p. 8a,n.8)

This Court has consistently refused to consider issues which had not been pleaded, proved, or briefed either in Federal District Court or in the Court of Appeals. See Miree v. Dekalb County, Ga., 433 U.S. 25 (1977); Stone v. Powell, 428 U.S. 465 (1976), rehearing denied. 429 U.S. 874 (1976); U.S. v. Estate of Donnelly, 397 U.S. 286 (1970). The Court should therefore not consider these issues at this time.

IV. A PRIVATE RIGHT OF ACTION EXISTS UNDER SECTION 504 AND THE ISSUES OF FEDERAL ADMINISTRATIVE EXHAUSTION AND PRIMARY JURISDICTION ARE NOT PROPERLY BEFORE THIS COURT.

Petitioner's argument on the private right of action issue has been mooted by the passage of the Rehabilitation, Comprehensive Services, and Devlepmental

Disabilities Amendments of 1978, P.L. 95-602, which were signed by the President on November 6, 1973.[3] The express statutory language of Section 505(b) of the 1978 Amendments recognizes the right to maintain a private action under Section 504: "In any action or proceeding to enforce or charge a violation of a provision of this Title, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Senate Committee Report on the 1978 Amendments explains the need for attorneys' fees as follows:

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[3]This Court has long adhered to the principle that subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. Red Lion, 395 U.S. 367 (1969); FHA v. Darlington, 358 U.S. 84 (1958); Glidden Co. v. Zdanok, 370 U.S. 530 (1962); Regents of Univ. of Calif. v. Bakke, 98 S.Ct. 2733 (1978).

> The committee believes that the rights extended to handicapped individuals under Title V...are, and will remain, in need of vigilance by handicapped individuals to assure compliance, and in vindicating private rights of action in the case of Section 502 and Section 503 cases, as well as those arising under Section 501 and 504. S.REP. NO. 95-890, 95th Cong. 2d Sess. 19 (1978) (Emphasis added). See also, 124 CONG. REC. S15590-S15593 (daily ed. Sept. 20, 1978) (remarks of Sens. Cranston and Bayh).

In Section 505(a), the 1978 Amendments again recognize the existence of a private right of action. Section 505(a)(1) provides that the rights, remedies, and procedures available under Section 504 shall be co-extensive with those available under Title VI of the Civil Rights Act of 1965, 42 U.S.C. 2000(d).[4] Legislative

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[4]The rights and remedies available under Title VI include a private right of action. Bakke, 98 S.Ct. at 2814-2815; Lau v. Nichols, 414 U.S. 563 (1974); Bossier Parrish School Bd. v. Lemon, 370 F.2d 847

history of Section 505(a)(1) explicitly recognizes that those rights include the right to maintain a private cause of action. See 124 CONG. REC. S1593 (daily ed. Sept. 20, 1978) (remarks of Sens. Cranston and Bayh).

Moreover, in the opinion concurred in by Chief Justice Burger and Justices Rehnquist and Stewart, Justice Stevens in Bakke, specifically cited Section 504 as an example of legislation which "Congress has repeatedly enacted...predicated on the assumption that Title VI may be enforced in a private action." 98 S.Ct. at 2814-2815.

Every circuit court which has considered the question of a private cause

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(5th Cir. 1967), cert. denied, 338 U.S. 911 (1967); Serna v. Portales, 499 F.2d 1147 (10th Cir. 1974)

of action under Section 504 has also sustained its existence.[5] In addition, numerous federal district courts have found that a private right of action exists under Section 504.[6] A private right of action is also supported by the United States Departments of Justice, and Health,

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[5]See Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); Lloyd v. Regional Transp. Auth.; United Handicapped Federation v. Andre; Kampmeier v. Nyquist, 553 F.2d 296 (2d Cir. 1977); Davis v. Southeastern Community College, 574 F.2d 1158 (1978).

[6]See Whitaker v. N.Y. Bd. of Ed., 77-C-2258 (E.D.N.Y. October 19, 1978); Davis v. Bucher, 46 U.S.L.W. 2699 (E.D. Pa. May 13, 1978); Camenisch v. Univ. of Tx., No. A-78-CA-061 (W.D. Tx. May 17, 1978); Simon v. St. Louis County, C.A. 77-114-C(4) (E.D. Mo. Jan. 31, 1978); Hairston v. Drosick, 423 F. Supp. 180 (S.D.W. Va. 1976); Mattie T. v. Holladay, C.A. No. D.C. 75-31 (S.D. Miss. July 28, 1977); Borden v. Rohr, No. 75-0844 (S.D. Ohio Dec. 31, 1975); Bartels v. Biernat, 405 F. Supp. 1012 (E.D. Wisc. 1975); Crawford v. Univ. of North Carolina, 440 F. Supp. 1047 (M.D.N.C. 1977); Herbold v. The Trustees of the Calif. St. Univ. and Colleges, C-78-1358-RHS (N.D. Cal. July 17, 1978).

Education and Welfare.[7]

Petitioner contends that if a private right of action is found, the Court must consider the issues of exhaustion of federal administrative remedies and primary jurisdiction. However, neither the District Court nor the Appeals Court considered whether federal administrative remedies were exhausted. Indeed, neither court ever determined whether administrative remedies even exist. The Fourth Circuit properly remanded to the District

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[7]The views of HEW, as the agency charged with administering Section 504, are entitled to great weight. Martinez v. Mathews, 544 F.2d 1233 (5th Cir. 1976). See also Allen v. State Bd. of Elections 393 U.S. 544, 557 n.23 (1969), in which this Court deemed it, "significant that the United States has urged that private litigants have standing to seek declaratory and injunctive relief in these suits."

Court to consider, if it deemed advisable, the legal issues of exhaustion and primary jurisdiction not reached in the Fourth Circuit opinion. (Petitioner, 11a n.9) Clearly these issues, like the issue of affirmative relief discussed above, are new matters which cannot be raised in this Court. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971); U.S. v. Estate of Donnelly 397 U.S. 286 (1970); Adickes v. Kress & Co., 398 U.S. 144 (1970); Tennessee v. Dunlap, 426 U.S. 312 (1976).

CONCLUSION

In sum, Petitioner has tried to distort the limited holding of the Fourth Circuit. The Fourth Circuit held only that, in light of intervening regulations, the college could not deny Ms. Davis

admission solely on the basis of her handicap. The Fourth Circuit also suggested that the District Court give close attention on remand to the affirmative relief set out in the HEW Regulations. The Fourth Circuit left it to the District Court to apply and interpret these regulations and allow the parties to develop a record on issues not raised in the District Court. The Fourth Circuit holding was exceedingly narrow and fair. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

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